

Federal Communications Commission

DA 02-614

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

)
Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Jackson and Salyersville, Kentucky)

MM Docket No. 00-79
RM-9802



REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 6, 2002;

Released: March 15, 2002

By the Chief, Allocations Branch:

1. At the joint request of Intermountain Broadcasting Company, licensee of Station WJSN-FM, Channel 293A, Jackson, Kentucky, and Wallingford Broadcasting Company, Inc., licensee of Station WRLV-FM, Channel 247C3, Salyersville, Kentucky ("petitioners"), the Allocations Branch has before it a Notice of Proposed Rule Making, 15 FCC Rcd 8828 (2000). Petitioners request the substitution of Channel 247C2 for Channel 293A at Jackson, Kentucky, and the modification of Station WJSN-FM's license accordingly. To accommodate the upgrade, petitioners also request the substitution of Channel 293C3 for Channel 247C3 at Salyersville, Kentucky and the modification of Station WRLV-FM's license accordingly.¹ Petitioners filed comments in support of the proposal reaffirming their intention to apply for the respective channels. Opposing comments were filed by Morgan County Industries, Inc. ("MCII"), licensee of Stations WLKS AM/FM, West Liberty Kentucky and WCBJ(FM), Champton, Kentucky. Intermountain Broadcasting Company, Inc. ("Intermountain") filed reply comments.

2. As indicated in the Notice, petitioners state that Station WJSN-FM in Jackson, Kentucky, and Station WRLV-FM in Salyersville, Kentucky are stations limited in power and coverage area. The stations are prohibited from increasing facilities on their own or adjacent channels due to spacing restrictions. Petitioners further state that this proposal requests an upgrade on a nonadjacent channel which would normally allow for competing expressions of interest. However, in similar situations, the Commission has acknowledged that while not strictly adjacent channel relationships, the mutual exclusivity of the channels involved is similar to the scenario provided for in Section 1.420(g)(3) of the Commission's Rules. Section 1.420(g)(3) allows the modification of a station's license to a higher class channel if the channel is a co-channel or adjacent channel mutually exclusive with the existing license. However, the Commission has acknowledged

¹ Station WRLV-FM was granted a license (File No. BLH-20010307AAI) for Channel 247C3 at Salyersville, Kentucky on May 22, 2001.

that it will consider analogous proposals involving channel substitutions at other communities which would be necessary to create a mutually exclusive relationship required under Section 1.420(g)(3), and has determined to consider these "incompatible channel swaps" on a case-by-case basis. See Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels, 60 RR 2d 114 (1986).²

3. In its opposing comments, Morgan County Industries, Inc., provides an engineering statement demonstrating that the proposed site (37-40-19 NL and 83-24-21 WL) for Channel 247C2 at Jackson, Kentucky, does not provide the minimum 70 dBu signal required by Section 73.315 of the Commission's Rule due to severe shadowing. Moreover, MCII states that its Station WCBJ(FM) in Campton, Kentucky, and to a lesser extent Stations WLKS AM/FM in West Liberty, Kentucky, all compete with Station WJSN-FM's Class A operation for both audience and advertising. Consequently, due to the proximity of the stations, if Station WJSN-FM would be allowed to upgrade to a Class C2 facility, it would be in a "much superior position to take away listeners and advertising revenues from Stations WCBJ(FM) and WLKS AM/FM, which would cause economic injury to and otherwise adversely affect those stations," citing Sanders Brothers Radio Station v. FCC and NBC v. FCC (KOA), 76 U.S. App. DC 238 (1942) aff'd, 319 U.S. 239 (1943). The premises considered, MCII requests that the petitioners' proposal be denied.

4. In its reply comments, Intermountain asserts that MCII's opposition fails to state anything that is not already a part of the record in this proceeding. Intermountain further asserts that MCII's claim that from the proposed site, Station WSJN-FM would not provide a minimum 70 dBu signal covering the community of Jackson is "simply incorrect." Intermountain states that it filed a supplement providing an extensive engineering showing that, using both the FCC standard and the Longley-Rice propagation methods, Station WSJN-FM at the proposed reference coordinates will provide the required 70 dBu coverage to Jackson. The supplement recognized that while there may not be a line-of-sight service to the entire city of Jackson, this is due to the unusually rugged terrain both surrounding Jackson and in the city itself. Intermountain argues that under existing case precedent, the proposed allotment of Channel 247C2 to Jackson may be granted even though line-of-sight service cannot be provided to the entire city of Jackson due to terrain obstructions, citing Madison, Indiana, 14 FCC Rcd 9518 (1999) (Channel 266A allotted to Madison where petitioner was able to show that 70 dBu signal extends beyond the city of license despite lack of line-of-sight service to portions of Madison due to a terrain obstruction); Vacaville and Middletown, California, 4 FCC Rcd 8315 (1989); recon. denied, 6 FCC Rcd 143 (1991) (reference site that cannot provide light-of-sight coverage still suitable where the proponent demonstrates that the transmitted signal will exceed 70 dBu over the entire principal community). Intermountain further argues that because of the unusual configuration of Jackson and the terrain both within and surrounding

²An "incompatible channel swap" is a channel substitution for an upgrade and an accommodating substitution that are mutually exclusive and are uniquely available, i.e., there is no alternate channel of its class that is fully spaced from the station's site.

Jackson, it is unlikely that a transmitter placed anywhere, even in the center of Jackson, would provide a line-of-sight to the entire city without shadowing. Intermountain concludes that, under the circumstances, the Commission either has the choice of not allotting any channels to communities with rugged terrain, or in the alternative, taking the action that is more in the public interest which is ensuring that, despite the rugged terrain, the community of license is fully covered by a 70 dBu or greater signal. Intermountain urges that Channel 247C2 be allotted at Jackson because the public interest would be well-served by the expanded service that would be provided by an upgraded WJSN-FM facility.

5. A staff engineering analysis of the proposal reveals that the community of Jackson is located about 13.2 kilometers south of the transmitting antenna site along the 171.3 degree north azimuth. Based on the standard prediction method in Section 73.313 of the Commission's Rules, the predicted 70 dBu contour distance is 32 kilometers, well beyond the city limits of Jackson. Because of the rugged terrain in the area, calculations done by the ITM computer program, utilizing Tech Note 101 prediction methodology, were submitted to support the claim that the predicted 70 dBu contour extends to beyond Jackson despite the lack of line-of-sight. We have examined these calculations and the terrain profile along three radials between the 165 degree north and 175 degree north azimuths through Jackson to a distance of 60 kilometers using a 3-arc-second terrain database. Based on our calculations, the predicted 70 dBu contour encompasses all of Jackson.

6. MCII claims that the upgrade at Jackson would put Station WJSN-FM "in a much superior position to take away listeners and advertising revenues from Stations WCBJ(FM) and WLKS AM/FM which would cause economic injury to and otherwise adversely affect those stations." This argument raises issues which the Commission has already determined are not relevant in either a licensing or allotment context. See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 FCC Rcd 638 (1988), recon. denied, 4 FCC Rcd 2276 (1989); and Cheyenne, Wyoming, 8 FCC Rcd 4473 (1993). Consequently, there is no basis under the current Commission precedent for consideration of those issues.

7. Based on information before us, we find that the requested channel substitutions constitute an "incompatible channel swap." Therefore, we believe that the public interest would be served by substituting Channel 247C2 for Channel 293A at Jackson, Kentucky, since it would enable Station WJSN-FM to expand its service area. To accommodate the upgrade, we will also substitute Channel 293C3 for Channel 247C3 at Salyersville, Kentucky. An engineering analysis has determined that Channel 247C2 can be allotted to Jackson in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.1 kilometers (8.2 miles) north at Station WJSN-FM's requested site.³ Additionally, Channel 293C3 can be allotted to Salyersville without the imposition of a site restriction at Station WRLV-FM's requested

³The coordinates for Channel 247C2 at Jackson are 37-40-19 North Latitude and 83-24-21 West Longitude.

site.⁴ In accordance with Section 1.420 (g)(3) of the Commission's Rules, we shall also modify the licenses of Station WJSN-FM and of Station WRLV-FM to specify operation on Channels 247C2 and 293C3, respectively.

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective April 29, 2002, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>
Jackson, Kentucky	247C2
Salysersville, Kentucky	293C3

9. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Intermountain Broadcasting Co., Inc., for Station WJSN-FM at Jackson, Kentucky, IS MODIFIED to specify operation on Channel 247C2 in lieu of 293A, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Wallingford Broadcasting Company, for Station WRLV-FM, Salysersville, Kentucky, IS MODIFIED to specify operation on Channel 293C3 in lieu of Channel 247C3, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WRLV-FM's license, BLH-20010307AAI, except the channel as specified above. Any other

⁴The coordinates for Channel 293C3 at Salysersville are 37-49-05 North Latitude and 83-17-01 West Longitude.

changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-20010307AAI, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Intermountain Broadcasting Co., Inc., licensee of Station WJSN-FM, is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

12. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Report and Order by Certified Mail, Return Receipt Requested, to the following:

Intermountain Radiocasting Company
1024 College Avenue
Jackson, Kentucky 41339
(Licensee of Station WJSN-FM)

Wallingford Broadcasting Company, Inc.
1030 Winchester Road
Irving, Kentucky 40336
(Licensee of station WRLV-FM)

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau